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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SANDRA AGUILAR,

Defendant and Appellant.

H032711

(Monterey County

Super.Ct.No. SS071052B)

Defendant Sandra Aguilar was convicted by a jury of one count of forgery in violation of Penal Code section 460, subdivision (d).<sup>1</sup> She was acquitted of two similar counts and the jury was unable to reach a verdict on a fourth count, resulting in dismissal of that count. The same jury convicted her codefendant, Humberto Flores, of four counts of forgery and acquitted him of two. All 10 forgery counts arose from defendants' having cashed stolen and forged credit card convenience checks that had been mailed by two separate issuing banks to two separate account holders, who never received them. All the stolen checks, four of which were made out to Aguilar and six of which were made out to Flores or his business in varying amounts just under \$1,000, were cashed by the defendants at a local market that offered a check cashing service to its customers who opened an account for this purpose.

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

At sentencing, Aguilar was placed on formal probation and ordered to serve 90 days in the county jail. The court scheduled a later hearing on the matter of victim restitution. At that hearing, and as a condition of probation, the court ordered Aguilar to pay victim restitution in the amount of \$3,896.78. This was the total amount of all four stolen checks made out to Aguilar, including those checks relating to the two counts of which she was acquitted and the dismissed count.

Aguilar appeals, contending that victim restitution was limited to the amount of the check representing the single forgery count of which she was convicted (\$949.75). We disagree and affirm the judgment.

## STATEMENT OF THE CASE

### I. *Factual Background*

Flores operated a wholesale flower business, known as Gentry Gardens, through which he supplied his various clients with flowers and greens. The clients frequently paid by check. When they did, he sometimes cashed those checks at Las Lomas Market, a small store in Watsonville near where he lived. The market offered this check-cashing service to its customers and required that the customer open an account for this purpose. When opening the account, the market would take the customer's contact information and fingerprint and would photocopy the check being cashed. The market then assigned the customer an account number. The market limited this service to cashing checks under \$1,000 and expected customers to cover checks that were not honored.

In the fall of 2006, Aguilar, who knew Flores through a mutual friend, began helping Flores with his business. She would assist him with preparing and faxing invoices and reports and she would sometimes go door to door offering Flores's services. According to Flores, Aguilar would also sometimes receive check payments from his clients if she were present when they picked up their orders. Flores did not formally or regularly pay Aguilar for her services either as an employee or an independent contractor.

On four different days between December 31, 2006 and January 21, 2007, Flores and Aguilar cashed 10 checks at Las Lomas Market, six made out to Flores or Gentry Gardens and four made out to Aguilar. Four of the checks were issued by Discover Bank on the account of Phillip Mason, who lived in Watsonville near Aguilar and whose mailbox was unsecured. The checks had been mailed by Discover Bank to Mason, who never received them. Mason's signatures on the checks were forged. All four of these checks were dated December 31, 2006, and cashed at Las Lomas Market for amounts slightly less than \$1,000. Two of the checks were made out to Flores and two to Aguilar, who together went to the market to cash them. Flores told the clerk at the market that Aguilar worked for him. All four checks were cashed using Flores's previously existing check-cashing account number with the market.<sup>2</sup> The clerk who cashed the checks made out to Flores brought them to her supervisor because she perceived that they were for larger amounts than Flores usually cashed. Her supervisor approved the transactions and initialed one of the checks.

In January 2007, Aguilar cashed two more checks made out to her at Las Lomas Market. The checks were drawn on the First USA account of Michael Fahey, who lived in Aptos and also had an unsecured mailbox.<sup>3</sup> Neither he nor his wife, who was also on the account, had received the checks, two of six on their account that were dated January 17, 20, or 21, 2007, and cashed at Las Lomas Market by either Aguilar or Flores.<sup>4</sup> All of

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<sup>2</sup> The two Discover checks made out to Aguilar were numbers 4660 and 4662, for \$969.73 and \$982.55, respectively. These related to counts 7 and 8, of which Aguilar was later acquitted. Those checks made out to Flores were numbers 4659 and 4661, for \$953.96 and \$872.65, respectively. These related to counts 1 and 2, of which Flores was also acquitted.

<sup>3</sup> Check number 6970 was made out to Aguilar for \$949.75. It was the basis for count 9, of which she was convicted. Check number 7224, made payable to Aguilar for \$994.75, was the basis of count 10, on which the jury deadlocked and which was later dismissed.

<sup>4</sup> The first of the Fahey checks made out to and cashed by Flores, numbered 6969. The check was made out for \$998.75 and was the basis for count 3, of which Flores was

the checks were forged. Aguilar was with Flores when she cashed the first of these two checks but she was alone when she cashed the second on January 21, 2007. She opened her own check-cashing account with Las Lomas Market that day in order to cash it. But the market also wrote Flores's account number on the back of the check, as he had "referred" Aguilar to the market. When cashing the check, Aguilar told the market clerk that these particular checks were for flowers or plants purchased by a customer for a shopping center opening.

At some point, some of the checks were returned unpaid to Las Lomas Market and one of the market's owners contacted Flores about them. Flores said that he would pay the money back. In February 2007, an owner of the market told a United States Postal Inspector, who was investigating the theft of Discover credit card convenience checks through the mail, that Discover check numbers 4659 (count 1, Flores) and 4660 (count 7, Aguilar) had been credited to Las Lomas Market but that check numbers 4661 (count 2, Flores) and 4662 (count 8, Aguilar) had been returned. The four checks were those drawn on Mason's Discover card account.

On March 5, 2007, Flores was arrested. He initially gave a false name but authorities were able to identify him by a distinctive tattoo. He admitted that he had presented some of the checks at the market and that he didn't know Messrs. Mason or Fahey. He said someone named Martinez had given him two of the checks in payment for plants and flowers. He said he also received customer checks from Aguilar and others who had worked for him. He knew that the market's bank had returned some of the checks he and Aguilar had cashed and he expected to reimburse the market when he refinanced his house.

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convicted. Numbers 7222 and 7225, made out to Flores for \$995.50 and \$992.75, respectively, were the basis of counts 4 and 5, of which Flores was also convicted. Check number 7223, was made payable to Flores's business, Gentry Gardens, for \$989.50. It was the basis of count 6, of which he was likewise convicted.

Aguilar was arrested the next day. She said she had obtained the three checks that she had cashed at Las Lomas Market when accompanied by Flores (counts 7, 8, and 10) from “people” she had done work for on Flores’s behalf. But she could not identify them other than to say they might be “Mexican.”

## II. *Procedural Background*

The defendants were charged by information with ten separate counts of forgery in violation of section 470, subdivision (d), one count for each check. The first six counts charged Flores and the last four charged Aguilar.

The case was tried to a jury. A clerk from Las Lomas Market testified that either Flores or Aguilar had cashed all ten stolen checks. Flores testified that he believed that all ten checks were in payment for work he had performed. With respect to the four checks payable to Aguilar, Flores testified that he had instructed his customers to make out the checks to her and that these checks were in payment for products or services that his business had provided. But he also testified that he didn’t know Mason or Fahey, that he could not identify what products or services had been provided to them, and that he no longer had any invoices relating to the checks. He said that Aguilar had given him the money from the four checks she had cashed and that he had given some of the money back to her, not as wages but more as a gift because she had been helping him.

The jury acquitted Flores on counts one and two concerning Mason’s Discover card checks but convicted him on counts three through six concerning Fahey’s First USA checks. The jury acquitted Aguilar on counts 7 and 8 relating to Mason’s checks but convicted her on count 9 relating to one of Fahey’s checks. The jury failed to reach a verdict on count 10, also concerning one of Fahey’s checks, and the court declared a mistrial, later dismissing that charge.

The court later suspended imposition of sentence and placed Aguilar on three years formal probation. With respect to victim restitution, the probation report and supplemental report recommended that Aguilar and Flores be ordered to jointly and

severally pay the total amount of all 10 checks. The court rejected that recommendation but indicated at sentencing its inclination to exercise its discretion under section 1203.1 to order restitution, as a condition of probation and in the interests of rehabilitation and the protection of public safety, for all four checks for which Aguilar was charged notwithstanding her acquittal on two counts and the dismissal of one. The court then ordered a separate hearing on the matter of victim restitution and reserved jurisdiction on the question. The court observed that the evidence adduced at trial showed complicity between Aguilar and Flores with respect to all 10 checks and that the explanations offered by Flores as to how and from whom the checks were received and what they were used for was implausible and “made absolutely no sense.”<sup>5</sup>

At the victim restitution hearing, neither party offered additional evidence. But the probation reports contained information from the United States Postal Service Inspection Service reports concerning the stolen checks. This information included that Aguilar and Flores had “forged and cashed” the four stolen Mason Discover card checks on December 31, 2006, and that they had successfully cashed the six stolen Fahey First USA checks in January 2007. The information also included that when Aguilar was arrested, she did not dispute having cashed the checks. She said that she worked for Flores as part of his flower business and that the checks were received from “ ‘people’ ” who gave her checks for flower deliveries. But she could not identify any of the people who had given her checks. When asked why checks were made out to her if they were in payment for Flores’s business services, she said that “she was not with Flores at the time she received the checks” and that she had “split the money up with Flores after cashing the checks.” And she admitted having endorsed the back of all four checks made out to her.

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<sup>5</sup> The court made these statements in connection with its denial of Aguilar’s motion to reduce her single forgery conviction to a misdemeanor.

The prosecution requested that restitution be imposed in the total amount of all four checks made out to and cashed by Aguilar—\$3,896.78. Aguilar maintained that restitution should be limited to the amount of the single check for \$949.75 for which she had been convicted (count 9). Pointing to its analysis of the information contained in the probation reports, the court ordered Aguilar to pay victim restitution in the amount of \$1,952.28 for the two Discover Card checks (counts 7 and 8) and \$1,944.50 for the two First USA checks (counts 9 and 10), for a total of \$3,896.78—the total amount of all four checks cashed by her. The court specifically said that it was exercising its discretion under section 1203.1 to impose victim restitution for amounts beyond the single crime of which Aguilar had been convicted for the purposes of “discouraging other crimes of a similar nature and . . . rehabilitation.”

Aguilar timely appealed.

## DISCUSSION

### I. *Probation Generally and Standard of Review*

“ ‘Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. [Citation.] The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.] The primary goal of probation is to ensure “[t]he safety of the public . . . through the enforcement of court-ordered conditions of probation.” (Pen. Code, § 1202.7.)’ (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 [(*Carbajal*)).] Accordingly, the Legislature [in section 1203.1, subdivision (j)] has empowered the court, in making a probation determination, to impose any ‘reasonable conditions, [including ordering restitution as provided in section 1203.1 subdivisions (a)(3) and (b),] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from the breach, and

generally and specifically for the reformation and rehabilitation of the probationer . . . .’ ”  
(*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).)

Although a trial court’s discretion is broad in probation matters, a probation condition must serve one of these purposes specified in section 1203.1. (*Olguin, supra*, 45 Cal.4th at p. 379; *Carbajal, supra*, 10 Cal.4th at p. 1121; *People v. Richards* (1976) 17 Cal.3d 614, 619 (*Richards*).) But because probation is a privilege, not a right, a probationer may validly consent to limitations that would otherwise be unconstitutional in preference to incarceration. (*Olguin*, at p. 384.) Along that line, “[i]f a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citations.]” (*Id.* at p. 379.)

An appellate court reviews conditions of probation for abuse of discretion. (*Olguin, supra*, 45 Cal.4th at p. 379; *Carbajal, supra*, 10 Cal.4th at p. 1121.) Generally, a probation condition will be held valid “unless it ‘ “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .” [Citation.]’ [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as [it] is reasonably related to preventing future criminality. (See, *Carbajal, supra*, 10 Cal.4th at 1121.)” (*Olguin, supra*, 45 Cal.4th at pp. 379-380.) As with any exercise of discretion, a court abuses discretion “when its determination is arbitrary or capricious or ‘ “ “ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ” [Citations.]’ [Citation.]” (*Carbajal, supra*, 10 Cal.4th at p. 1121.)

## II. Analysis

Aguilar contends that the court abused its discretion by ordering restitution for any amounts beyond the one check that gave rise to her single conviction.



Section 1203.1 specifically authorizes the payment of restitution as a condition of probation. And making the victim whole has generally been deemed a proper deterrent to future criminality, one of the stated purposes of probation. (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) To be a valid condition of probation, restitution need not be limited to the transactions or amounts directly flowing from the criminal acts of which a defendant was actually convicted. (*Ibid.*) But like any probation condition, an order for restitution must be narrowly tailored to serve a purpose described in section 1203.1—making amends for breach of law or injury resulting from the breach and rehabilitating and reforming the probationer—lest courts be “reduced to ‘mere collection agencies’ ” in the pursuit of civil damages. (*Richards, supra*, 17 Cal.3d 614, 620.)

In *Lent*, the California Supreme Court upheld a probation condition that ordered the defendant to pay victim restitution for funds allegedly taken in a related criminal charge of which he was acquitted. The defendant had been charged with two counts of grand theft involving a scheme of conduct affecting the same victim. The first charge concerned \$1,278 but the defendant was acquitted of that charge. The second related to \$500, of which the defendant was convicted. The trial court ordered payment of victim restitution as a condition of probation in the amount of \$1,778—the total of the two amounts added together.

The Supreme Court upheld the order, concluding that notwithstanding the acquittal, the victim had suffered a loss of the total amount and making a victim whole has generally been deemed a deterrent to future criminality—a proper purpose of a probation condition. (*Lent, supra*, 15 Cal.3d at p. 486.) The court also reiterated that “ ‘there should be no hard and fast rule that money payments as a condition of probation be limited to the direct consequences of the particular crime of which defendant stands convicted.’ ” (*Ibid.*) But the court emphasized that restitution cannot be based on mere civil claims that a victim might have against a defendant, which claims would be subject to a lower burden of proof than criminal charges arising from the same conduct, and that

it must relate to past or future criminal conduct. In stressing this point, the court observed that in that particular case, the trial court had not based its order strictly on the evidence adduced at the criminal trial but that it had conducted an “unusually prolonged probation hearing” in which “additional circumstances were developed” on the question of victim restitution alone. (*Id.* at p. 487.) As a result of that hearing, the trial court had concluded that the acquittal did not absolve the defendant of the “ ‘false statements about where those proceeds went and for what purpose’ ” and that he had perjured himself at trial, thus justifying restitution in the full amount of the victim’s loss despite the acquittal. (*Ibid.*)

But *Lent* does not stand for the proposition that there must be an extended evidentiary hearing on restitution in every case in which it is ordered, as a condition of probation, for amounts in excess of those directly related to a conviction or even for amounts involved in a related acquittal. Nor does *Richards*, on which Aguilar relies, so hold.

In *Richards*, the defendant was likewise charged with two counts of grand theft. But each count involved separate victims and separate transactions. Defendant was convicted on one count and the trial court, as a condition of probation, ordered him to pay victim restitution on the other count, of which he had been acquitted. (*Richards, supra*, 17 Cal.3d at p. 616.) The Supreme Court held that this was improper, not because the trial court had failed to hold a separate restitution hearing but because the court had “appeared to posit an additional and ill-conceived purpose” beyond the defendant’s rehabilitation in ordering restitution—resolution of his civil liability to the second victim. (*Id.* at p. 620; see also *People v. Towne* (2008) 44 Cal.4th 63, 88 [characterizing the *Richards* holding as requiring proper purpose for restitution as a condition of probation in the context of an acquittal and resolution of civil liability is not one].) The trial court had revealed this improper purpose by offering as justification for the order that defendant “ ‘owed the money’ ” and that “ ‘allowing him to avoid the debt would be unjust.’ ” (*Ibid.*)

The Supreme Court concluded that the trial court had erred in its erroneous belief that “restitution could be imposed merely to collect the purported debt.” (*Id.* at p. 623.)

The high court did note that in contrast to *Lent*, the trial court in *Richards* had not held a separate restitution hearing to determine facts other than those that had led to the defendant’s acquittal. The court concluded from that absence that the trial judge was “not justified [in drawing] conclusions about an acquitted defendant’s responsibility for restitution to persons other than the criminal victim based solely on the trial record.” (*Richards, supra*, 17 Cal.3d at p. 624.) But the court did not hold that an evidentiary hearing is always required in order to direct victim restitution as a condition of probation in amounts in excess of those directly related to a conviction. Nor did the court specify what kind of “additional circumstances” must be developed (*Lent, supra*, at p. 487) beyond the facts adduced at trial, or the manner in which they must be developed, in order to direct victim restitution as a condition of probation for amounts relating to charges of which a defendant stands acquitted.

The Supreme Court reaffirmed *Lent* in *Carbajal*,<sup>6</sup> in which the defendant had pled no contest to a hit and run. The court held that it was within the trial court’s discretion to condition probation on payment of restitution to the owner of property damaged in the accident from which defendant had unlawfully fled although the damage was caused by the accident itself and not by his having fled the scene. The court observed that “[u]nder certain circumstances, restitution has been found proper where the loss was caused by related conduct not resulting from a conviction (*People v. Miller* [(1967)] 256

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<sup>6</sup> In *Carbajal*, the court also disapproved of *Richards* to the extent it had held that restitution for a dismissed count is not justified if the state of mind for the dismissed count is different from the state of mind for the admitted count. (*Carbajal, supra*, 10 Cal.4th at p. 1126.) Under *Carbajal*, it is enough that conditioning probation on a restitution order “would make amends ‘to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.’ (Pen. Code, § 1203.1, subd. (j)).” (*Carbajal, supra*, at p. 1126, fn. omitted.)

Cal.App.2d [348,] 355-356), by conduct underlying dismissed and uncharged counts (*People v. Goulart* (1990) 224 Cal.App.3d 71, 79), and by conduct resulting in an acquittal ([*Lent*], *supra*, 15 Cal.3d at p. 483.)” (*Carbajal, supra*, 10 Cal.4th at p. 1121.)

Further citing *Lent*, the high court in *Carbajal* said, “We determined that an order for restitution, which attempts to make a victim whole, ‘has generally been deemed a deterrent to future criminality,’ and concluded the court is not limited to the transactions or amounts of which the defendant is actually convicted.” (*Carbajal, supra*, 10 Cal.4th at p. 1123.) The court then reaffirmed that under *Lent*, “the restitution condition must be reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality.” (*Ibid.*) Consistently with *Lent*, in *Carbajal*, in addition to finding that restitution was related to the crime of leaving the scene of the accident, the regulatory purpose of which was to provide others with information needed to pursue remedies for civil damages, the court also concluded that the restitution ordered there was related to the goal of deterring future criminality. (*Id.* at p. 1124.) And as in *Lent*, there was no question in *Carbajal* that the defendant was in any event responsible for the victim’s loss as the defendant had conceded he had committed a negligent act of driving that caused the damage to the victim’s parked car. (*Ibid.*) So long as the purpose of victim restitution meets one of the statutory goals of probation, the only limitation the high court placed on it in *Carbajal* is that it must “not be based merely upon the trial court’s subjective belief regarding the appropriate compensation; there must be a factual and rational basis for the amount ordered and the defendant must be permitted to dispute the amount or manner in which restitution is to be made.” (*Id.* at p. 1125.) Again, although the case did not involve restitution for conduct that was the subject of an acquittal, instead focusing on negligent but non-criminal conduct, the court did not hold that a separate evidentiary hearing must be held on victim restitution. Nor did it specify either how the factual basis for the amount ordered must be established or the procedural context a defendant must be provided in order to challenge it.

The takeaway from this trio of California Supreme Court cases is that in the context of probation, which is a privilege and not a right, the trial court has broad discretion to impose victim restitution as a condition whether or not the defendant has been convicted of the underlying crime. But the amounts must be reasonably related to the crime of which defendant was convicted or to future criminality. And particularly where there has been a related acquittal, the trial court must look to additional circumstances beyond the evidence adduced at trial to order restitution for amounts that are the subject of that charge.

Applying that construct here, most importantly, the trial court made clear that the amount of restitution ordered was for proper purposes—*rehabilitation, protection of public safety, and deterrence of future criminality*. And, after receiving and specifically relying on the probation report and supplemental report, the court held a separate restitution hearing, providing Aguilar the opportunity to factually dispute the court's previously announced intentions concerning restitution. Thus, the court considered additional circumstances than the evidence adduced at trial in the form of the probation reports. Aguilar did not testify at trial but those reports showed that she admitted having cashed all four stolen checks, and having received at least some of the money from each. She could not identify the people from whom she had received checks and she generally aligned herself with Flores's trial testimony about how and from whom checks were received and what they were used for, all of which the court had found "made absolutely no sense." The court had specifically found complicity between Aguilar and Flores on this when it denied her motion to reduce her felony conviction to a misdemeanor. And all four checks, of similar amounts falling just under Las Lomas Market's check-cashing limit, were cashed in the exact same manner, making them all transactionally related, particularly as to the dismissed count (count 10) that involved the same victim as the count of which Aguilar was convicted (count 9).

Based on all of these facts and circumstances, and especially the court's articulated proper purposes in doing so, the court did not abuse its broad discretion in ordering victim restitution, as a condition of probation, for all four checks cashed by Aguilar, notwithstanding that she was convicted of only one count relating to just one of those checks. The court was not addressing or resolving Aguilar's civil liability in ordering restitution and it in fact relied on additional circumstances than the evidence adduced at trial. The order thus comports with section 1203.1 and *Lent* and it does not run counter to *Richards*, as Aguilar principally contends and which she reads too narrowly. Moreover, the order directed restitution for the exact amount of all four checks added together, establishing a rational and factually grounded basis for its total. The restitution ordered thus did not violate any authority that might establish a misapplication of the law and it accordingly constituted a proper exercise of the trial court's discretion.

#### DISPOSITION

The judgment and order of restitution are affirmed.

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Duffy, J.

WE CONCUR:

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Mihara, Acting P.J.

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McAdams, J.